United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2132

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES SMITH,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

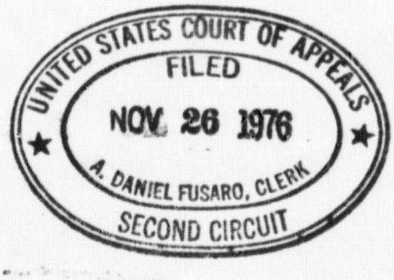
Docket No. 76-2132

B
P/S

CORRECTED COPY

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CHARLES SMITH
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 723-2971

MICHAEL YOUNG,
Of Counsel.

Table of Contents

TABLE OF CASES

SUPPLEMENTAL TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES SMITH, Petitioner-Appellant, -against- UNITED STATES OF AMERICA, Respondent-Appellee.	Docket No. 76-2132

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the district court erred in refusing to set aside appellant's guilty plea, judgment of conviction and sentence for violation of 18 U.S.C. §2114.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) entered September 13, 1976, denying appellant Smith's application pursuant to 28 U.S.C. §2255.

This Court continued the Federal Defender Services Unit, The Legal Aid Society, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On June 8, 1972, a five count indictment[1] was filed in the Federal District Court for the Eastern District of New York charging appellant Smith and others with participation in the assault of one John H. Talton, Jr., identified in the indictment as an agent of the Bureau of Narcotics and Dangerous Drugs[2], and with the theft from Talton of $5000 belonging to the United States. These facts were alleged in Count One of the indictment to constitute a violation of the first section of 18 U.S.C. §2114, which proscribes simple robbery of a

---

[1]The indictment is set forth in appellant's separate appendix as B.

[2]See Counts Three and Four of the indictment.

person in custody of mail matter or money belonging to the United States; in Count Two to constitute a violation of the second section of §2114, which proscribes aggravated robbery of such a person; in Count Three to constitute a violation of the first section of 18 U.S.C. §111 which proscribes assault on a federal officer, and 18 U.S.C. §1114 which proscribes the killing of a federal officer[2a]; in Count Four to constitute a violation of the second section of §111 which proscribes aggravated assault on a federal officer, and §1114 which proscribes the killing of a federal officer; and in Count Five to constitute a violation of 18 U.S.C. §641 which proscribes the theft of money from the United States.

On July 17, 1972, petitioner Smith pleaded guilty to Count One of the indictment, which alleged that the robbery of Talton constituted a violation of the first section of 18 U.S.C. §2114[3]. The district court, in accepting this plea, acknowledged the effect of Count Two with its fixed twenty-five year sentence, on the defendant's decision to plead guilty to Count One:

> THE COURT: Mr. Smith, other than the risk of going to jail for twenty-five years if you are found guilty on trial, other than that consideration, has anyone forced you to plead guilty?
>
> (PP at 17[4])

Likewise, the effect of the fixed twenty-five year penalty of Count Two in deterring petitioner Smith from withdrawing

---

[2a]The citations to 18 U.S.C. §1114 in Counts Three and Four were improper since the agent was not killed.

[3]The transcript of the plea proceeding on July 17, 1972 is set forth in appellant's separate appendix as H.

his guilty plea to Count one, despite his post-plea protestations of innocence, was apparent at the sentencing proceeding. Thus, the Court stated:

> According to the presentence report he [appellant Smith] stated that he was not guilty, that he pleaded guilty on the attorney's advice in order to avoid the twenty-five year sentence.
>
> (SP at 5).

Later in the proceeding, the following colloquy took place:

> MR. DE PETRIS: Your Honor, before proceeding to sentence on both matters, I was wondering whether your Honor would want to clarify the fact bases for the plea for the original indictment, especially in view of the protestations of innocence to the Probation Officer.
>
> THE COURT: The presentence report which I have made available to defendant's counsel and which they have just returned states the offense and states that he pleaded guilty on the advice of his attorney and if convicted he faced 25 years. Of course, as I read the statute, there was a mandatory 25 year sentence if he were convicted of participation in the armed robbery of a Federal agent, and there is going to be a substantial prison sentence and if the defendant wants to withdraw his plea and go to trial now, this is his last opportunity to make that request. I am not sure I would grant such an application because I have heard guilty pleas from the other other three defendants in the case, and from

---

[4] Numbers in parenthesis refer to pages of the transcripts of the proceedings in this case. Numbers preceded by PP refer to the plea proceedings on July 17, 1972 (Appellant's separate appendix at II). Numbers preceded by SP refer to the sentencing proceeding on January 23, 1973 (Appellant's separate appendix at I).

all that I have learned I think that a jury would convict this defendant.

(SP at 17)

Appellant Smith was then sentenced to ten years of incarceration.

On or about November 7, 1975, appellant Smith filed a petition[5] pursuant to 28 U.S.C. §2255[6] seeking an order setting aside his guilty plea, judgment of conviction and sentence and dismissing the indictment. This application alleged that there was no factual basis for his guilty plea, that the plea was not entered knowingly and voluntarily, and that the indictment was defective to petitioner's prejudice, all in violation of Rules 7(c) and 11 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments of the Federal Constitution.

In his petition and accompanying memoranda[7], appellant Smith explained that there was no factual basis for his plea of having violated the first section of 18 U.S.C. §2114 (Count One) because the facts alleged in the indictment and the facts

---

[5]This petition is set forth in appellant's separate appendix as C.

[6]At the time he filed his petition, appellant Smith was still incarcerated. He has subsequently been released on parole.

[7]Appellant's memorandum in support of his petition is set forth in appellant's separate appendix as E. The Government's answering memorandum is set forth in appellant's separate appendix as F. Appellant's reply memorandum is set forth in appellant's separate appendix as G.

admitted by appellant at the plea proceeding lacked the "postal nexus" requisite to a violation of that statute. Smith further stated in both his petition and a subsequent affidavit[8] that his plea was not knowing and voluntary because he had been erroneously advised that the alleged robbery of Talton constituted a violation of both sections of §2114, and that if he was convicted of the aggravated robbery proscribed in the second section of §2114 (Count Two of the indictment), he would receive the mandatory twenty-five year sentence required by that provision. He stated that he had pleaded guilty to Count One in order to avoid the possibility of conviction and a twenty-five year sentence under Count Two. He stated that he would not have pleaded guilty if he had known that he could not validly have been convicted or sentenced under either Count One or Count Two.

The district court denied appellant Smith's application without a hearing[9]. It held, as indeed the Government had con-

---

[8]This affidavit is set forth in appellant's separate appendix as D.

[9]This case was originally assigned to The Honorable Orrin Judd, who conducted a hearing on the question of the voluntariness of the guilty plea. Judge Judd died, however, before making findings of fact or rendering a decision on the application. The case was then assigned to Judge Mishler, who decided the case without a hearing. To the best of appellant's counsel's knowledge, the hearing before Judge Judd was never transcribed. Judge Mishler's memorandum decision is set forth in appellant's separate appendix as B.

ceded, that appellant Smith could not properly have been convicted and sentenced under §2114 for either simple robbery (Count One) or aggravated robbery (Count Two) because of the absence of the "postal nexus" (memorandum decision at 4, 5, 7). The court further held that "the record sustains Smith's claim that he pleaded to Count One to avoid the harshness of the penalty in the likely event of conviction on Count Two." (Id. at 6). Despite these findings, the court refused to set aside the plea of guilty or the sentence imposed under §2114. In so doing, the court held that the fact that appellant had pleaded guilty to, and been sentenced under a statute he had not violated did not matter because the facts he admitted at his plea proceeding constituted a violation of other federal crimes, namely 18 U.S.C. §§641 and 2. The court further held that the fact that appellant pleaded to the first section of §2114 (Count One) in order to avoid the mandatory twenty-five year sentence for violation of the second section of 2114, did not affect the validity of his plea, despite the fact that he could not validly have been subject to that sentence and would not have pleaded guilty if he had known that fact.

ARGUMENT

THE DISTRICT COURT ERRED IN REFUSING TO SET ASIDE APPELLANT'S GUILTY PLEA, JUDGMENT OF CONVICTION AND SENTENCE FOR VIOLATION OF 18 U.S.C. §2114.

Appellant Smith is presently serving a sentence imposed pursuant to a guilty plea and judgment of conviction for violation of 18 U.S.C. §2114, a crime which both the Government and the district court agree he did not commit. Moreover, the district court found that appellant Smith entered that guilty plea in order to avoid a mandatory twenty-five year sentence, which he had erroneously been led to believe, by everyone including the district court, would be the inevitable sentence if he was convicted of the robbery charged in the indictment. Finally, it must be accepted for purposes of this proceeding, that appellant Smith would not have pleaded guilty had he known that he could not be liable for that mandatory twenty-five year sentence, even if convicted of the acts charged in the indictment[10]. In the

---

[10]Since the district court denied appellant Smith's application without a hearing, it was required to credit Smith's claim that he would not have pleaded guilty if he had known that he would not have been liable for the mandatory twenty-five year sentence even if convicted of the alleged robbery. Cooper v. Pate, 378 U.S. 546 (1964); Townsend v. Sain, 372 U.S. 293 (1963); Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973).

face of these established facts, the district court's refusal to set aside appellant Smith's guilty plea and sentence was error.

The district court's initial error lay in its characterization of this case as one concerning a mere "miscitation" of a statute (memorandum decision at 5). Not one of the cases cited by the district court for its proposition that "a miscitation is not a ground for vacating an otherwise valid plea" involved a guilty plea. Rather, all dealt with convictions after trial. United States v. Rivera, 513 F.2d 519, 533 n.21 (2d Cir. 1975); United States v. Calabro, 467 F.2d 973, 981 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973); United States v. McKnight, 253 F.2d 817, 820 (2d Cir. 1958). Those cases held only that where the Government had proved at trial all of the elements of the statute which should have been cited in the indictment, a miscitation would not normally prejudice any of the rights of the defendant. See Fed.R.Cr.P. 7(c).

The present case, to the contrary, involves a guilty plea -- a waiver of the constitutional right against self-incrimination. Such a waiver is valid only if it is voluntary and knowing, with full understanding of the nature of the crimes charged and the maximum penalties which can be imposed. Moreover, the record must establish a factual basis for every element of the crime

to which the defendant pleads. See e.g., Rule 11, Fed.R.Cr.P.; McCarthy v. United States, 384 U.S. 459, 466 (1959); United States v. Irrizarry, 508 F.2d 960, 963-966 (2d Cir. 1974). The record of the present proceeding establishes that none of these requirements were satisfied. Rather, appellant was induced to plead guilty on the basis of erroneous information, from various sources including the court, to the effect that the alleged assault and robbery of Talton constituted a violation of 18 U.S.C. §2114 and that Smith would be subjected to the mandatory twenty-five year sentence for the aggravated form of that crime if he was convicted of that robbery. As the district court itself acknowledged, appellant Smith was thereby induced to plead guilty to simple robbery under §2114, a crime of which he was likewise not guilty.

That appellant Smith is not guilty of simple robbery under §2114, the crime to which he pleaded guilty and is presently being punished, or aggravated robbery under §2114, the charge whose mandatory sentence induced the guilty plea, is not at issue in this appeal. As the Government conceded and the district court found, the alleged robbery lacked the requisite "postal nexus," an essential element of any violation of §2114. See e.g., United States v. Reid, 517 F.2d 953, 956 (2d Cir. 1975); United States v. Rivera, 513 F.2d 519, 531-532 (2d Cir. 1975). Absent this "postal nexus," there is no factual basis for an essential element of the crime to which appellant Smith pleaded guilty. Consequently, that plea is invalid.

Rule 11, Fed.R.Cr.P.; McCarthy v. United States, supra, 394 U.S. at 467; Santobello v. New York, 404 U.S. 247, 261 (1971); Irizarry v. United States, supra, 508 F.2d at 963-966; United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974); Schworak v. United States, 419 F.2d 1313 (2d Cir. 1970); United States v. Steele, 413 F.2d 967, 969 (2d Cir. 1969).

Moreover, absent proper advice as to his non-liability for the charges in either Count One or Count Two, and particularly his non-liability for the mandatory twenty-five year sentence of the latter Count, Smith's plea was void because it was not made "understanding the nature of the charges." Rule 11, Fed.R.Cr.P.; McCarthy v. United States, supra, 394 U.S. at 464-466; Irizarry v. United States, supra. It is beyond dispute that a clear understanding of every element of the crimes charged, such as the element of "postal nexus" requisite to a violation of §2114, is fundamental to an "understanding of the nature of the charges." McCarthy v. United States, supra, 394 U.S. at 467, n.20 & 471; Irizarry v. United States, supra, 508 F.2d at 965; Seiller v. United States, 75-2002, slip op. 6509, 6538 (2d Cir. December 1, 1975). Such "understanding" also requires accurate knowledge as to the maximum possible penalties to which a defendant would be liable (Jones v. United States, 440 F.2d 466, 468 (2d Cir. 1971); See also Marvel v. v. United States, 380 U.S. 262 (1965); Tucker v. United States,

409 F.2d 1291, 1295 (5th Cir. 1969)) or as in this case, would not be liable. Hammond v. United States, 528 F.2d 15 (4th Cir. 1975); Cooks v. United States, 461 F.2d 530 (5th Cir. 1972).

Moreover, the coercive effect of the misinformation which the appellant received as to his liability for the mandatory twenty-five year sentence rendered his guilty plea involuntary, and therefore void. Hammond v. United States, supra; Cooks v. United States, supra; Kelsey v. United States, supra.

Finally, even if this is merely a case of "miscitation" as the district court held, the fact that the "miscitation" compelled appellant Smith to plead guilty when he would not otherwise have done so requires that his plea be set aside. Rule 7(c) of the Federal Rules of Criminal Procedure provides that miscitations are grounds for dismissal of an indictment when they "mislead the defendant to his prejudice," which was clearly the case in the present proceeding.

A. The advice given to appellant Smith as to his liability under 18 U.S.C.§2114 was erroneous at the time of his plea proceeding.

The district court's denial of appellant's application was based on its conclusion that this case was governed by the series of cases, commonly known as the "Brady trilogy[11]". Those cases denied persons who had previously pleaded guilty the retroactive benefit of subsequent Supreme Court decisions establishing new procedural rights for criminal defendants.

The Brady cases are inapposite first, because unlike those cases, this case does not involve a question of retroactivity. The district court's premise that "[a]t the time Smith offered his plea, the statutory interpretation of §2114 comported with the advice of Smith's counsel, the prosecutor's statements and the pronouncement of the court...[12]" was simply incorrect. That premise was apparently based on the district court's opinion that §2114 did not become limited to postal crimes until this Court expressly stated that it was so limited in the Court's 1975 decisions in United States v. Rivera, supra, and United States v. Reid, supra. Unlike the Brady cases, however, Rivera and Reid did not make "new" law. They did not reverse any previous decisions by

---

[11]These cases include Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

[12]Memorandum opinion at 6.

this Circuit, or indeed any other circuit, which were in effect at the time of the Smith plea proceeding. Rather, Rivera and Reid only further clarified what was already clearly apparent from the legislative history, expert opinions, and judicial decisions prior to Smith's plea proceeding -- that §2114 was limited to postal offenses. Neither the district court nor the Government have been able to point to a single case decided prior to Smith's plea in which the issue of the scope of §2114 was raised and held to include thefts or assaults on narcotics agents[13]. Indeed, the only court which appears to have confronted this issue prior to Smith's plea proceeding concluded:

> The derivation, codification, revision and explanation of what is now 18 U.S.C. §2114 thus all clearly indicate that the assault proscribed by that section is an assault which forms an integral part of an unsuccessful attempt to rob a mail carrier.
>
> United States v. Spear, 449 F.2d 946, 954 (D.C.Cir. 1971).

---

[13]In response to this argument below, the Government cited two cases in which convictions under §2114 for non-postal related crimes were affirmed prior to Smith's plea proceeding. In both of those cases, however, the convictions were clearly never challenged on the ground that §2114 required proof of a postal nexus. United States v. O'Neill, 436 F.2d 571 (9th Cir. 1970); United States v. Sherman, 421 F.2d 198 (4th Cir.), cert. denied sub nom. Sherman v. United States, 398 U.S. 914 (1970).

That §2114 required a "postal nexus" was also established, prior to Smith's plea proceeding, by the legislative history of that provision:

> At the time of the 1935 amendment to §2114, Act of August 26, 1935, ch. 694, 49 Stat. 867, which added the phrase "money or other property of the United States" to "mail matter" in 18 U.S.C. §320(1934 ed.), §320 stood in the portion of the Criminal Code, then Chapter 8, entitled Offenses Against Postal Service (Code of Laws of the United States of America in Force January 3, 1935). Its predecessors had been similarly organized in codifications having the force of positive law. See Act of March 4, 1909, An Act To codify, revise, and amend the penal laws of the United States, ch. 321, §197, 35 Stat. 1126 (part of Chapter Eight, Offenses Against the Postal Service); Rev.Stat. §§5472, 5473 (1878)(part of section devoted to Postal Crimes). The 1935 amendment, H.R. 5360, 74th Cong., 1st Sess. (1935), came in response to a 1933 request from the Postmaster General and was handled in the House by the Committee on the Post Office and Post Roads, see H.R.Rep. No. 582, 74th Cong., 1st Sess. (1935), and in the Senate by the Committee on Post Offices and Post Roads, see Sen.Rep. No. 1440, 74th Cong., 1st Sess. (1935). Despite the generality of the language in the amendment and in the titles and language of the committee reports, no one would have entertained any doubt of the limited scope of §320 if it had been allowed to remain in the chapter of the Criminal Code where Congress had placed it. And remain it did for a period of years in codifications which, though unofficial, were widely used. See 18 U.S.C. §320 (Cum.Supp. V, The Code of the Laws of the United States of America, 1934 Edition (1939)); 18 U.S.C. §320 (1940 ed.); 18 U.S.C. §320

> (1946 ed.). The Reviser's transfer of §320 in 1948, Act of June 25, 1948, ch. 645, 62 Stat. 797, to Chapter 103, Robbery and Burglary, where it now appears as §2114, with what were characterized as "[m]inor changes...in phraseology," did not expand the meaning Congress had entertained in 1935. Although constituting positive law, "[t]he 1948 Revision was not intended to create new crimes but to recodify those then in existence." Morissette v. United States, 342 U.S. 246, 266--269 n. 28, 72 S.Ct. 240, 253, 96 L.Ed. 288 (1952).
>
> United States v. Reid, 517 F.2d 953, 957 (2d Cir. 1975) (Footnotes omitted).

Although Judge Friendly's analysis in Reid took place after Smith's plea proceeding, the legislative history which Judge Friendly found to limit §2114 to postal offenses was a matter of public record well in advance of that proceeding. Moreover, as Judge Friendly noted, leading authorities on the subject of federal criminal law had publicly expressed the view, well in advance of Smith's 1972 plea, that §2114 was limited to postal offenses:

> The Brown Commission, which has responsibility for drafting the Proposed New Federal Criminal Code, see Final Report of the National Commission on Reform of Federal Criminal Laws §201, Comment at p. 15 (1971)(in discussing a proposed new jurisdictional basis for treating property crimes against the United States) noted that present coverage was somewhat spotty and dispersed: "Title 18 U.S.C. §2112, for example, limits robbery to property belonging to the United States, while §2114 deals with the mail." Senator McClellan's memorandum on the history and various aspects of his Proposed Code, The Challenge of a Modern Feder-

al Criminal Code, in Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., part 1, at 21, 36 (1971), discussed the instances in which the offense of robbery now dealt with in chapter 103 of title 18 would be retained under his bill: "special maritime and territorial jurisdiction (section 2111); property of the United States (section 2112); Federal Deposit Insurance Corporation banks (section 2113); and the mails (section 2114)."

(Ibid., at 957, n.5).

Since Rivera and Reid were thus only clarifications, and not changes in existing law, the district court's invocation of the Brady trilogy was improper. See e.g., Kelsey v. United States, 484 F.2d 1198 (3d Cir. 1973).

This case is governed rather by the established principle that a guilty plea must be set aside if it was entered on the basis of erroneous advice, particularly when, as here, that misinformation went to the elements of the crimes charged or the maximum penalties the defendant would face if he went to trial. Such pleas must be set aside, regardless of whether the erroneous advice was provided by the court (see e.g., United States v. Jasper, 481 F.2d 976 (3d Cir. 1973); Cooks v. United States, supra, 461 F.2d at 533; Paige v. United States, 443 F.2d 781 (2d Cir. 1971); cf. Harris v. United States, 426 F.2d 99 (6th Cir. 1970); Barry v. United States, 412 F.2d 189 (3d Cir. 1969)) or by counsel (see e.g., Kelsey v. United States, supra; Cooks v. United States, supra; Hammond v. United States, supra; United States v. Simpson, 436 F.2d 162, 164 (D.C.Cir. 1970); Mosker v. La Vallee, 491 F.2d 1346 (2d Cir.), cert. denied, 416 U.S. 906 (1974); Allison v. Blackledge, 533 F.2d 894 (4th Cir. 1976)) or, as in this case, by both counsel and the court. See e.g., United States v. Jasper, supra.

In a related context, Smith's plea is invalid because it was induced by a threat of prosecution on a charge, namely violation of §2114, which would have been improper or illegal,

regardless of whether that impropriety was known to the prosecutor at the time he threatened the prosecution. See e.g., Lassiter v. Turner, 423 F.2d 897 (4th Cir. 1970); Brady v. United States, supra, 397 U.S. at 751, fn.8 (a guilty plea is improper if rendered because "the prosecutor threatened prosecution on a charge not justified by the evidence.").

Since appellant's plea was coerced by erroneous information and by threat of improper prosecution, it must be set aside.

B. Assuming arguendo that Rivera and Reid made "new" law, those decisions should be applied retroactively to Smith's plea proceeding.

Even assuming arguendo that the district court was correct in holding that Rivera and Reid made "new" law, that court was incorrect in concluding that the Brady trilogy proscribed retroactive application of that "new" law to Smith's plea proceeding.

It is established in common law, and the decisions of the Supreme Court and this Circuit that judicial decisions such as Rivera and Reid are subject to a "general principle of retroactivity." Robinson v. Neil, 409 U.S. 505, 507-508 (1973); Norton v. Shelbey County, 118 U.S. 425, 442 (1886); Ferguson v. United States, 513 F.2d 1011,1012 (2d Cir. 1975).

Constitutional due process and this general principle of retroactivity require that, when a judicial decision such as Reid causes a change in substantive law relating to a criminal statute, persons who have previously pleaded guilty to violation of that statute are entitled to the retroactive application of that decision. If it appears, as a result of that change in substantive law, that the defendant could not have been prosecuted for the crime to which he pleaded guilty, then his plea must be set aside. Thus, in United States v. Liguori, supra, a Supreme Court decision rendered after Liguori pleaded guilty established that he was not guilty of, and could not have been prosecuted for, the crime to which he had pleaded

guilty. Consequently, this Court set aside his plea. Since the Government in the present proceeding has conceded, and the district court expressly found that appellant Smith was not guilty and could not have been prosecuted for violation of §2114, his plea of guilty to charge must likewise be set aside.

The district court's reliance on the Brady trilogy to deny appellant this relief was error. The Brady trilogy carved a narrow exception in the otherwise controlling presumption of retroactivity. That exception was limited to denying the application of Supreme Court decisions establishing new procedural rights[14] for criminal defendants to those defendants who pleaded guilty prior to the decision. Moreover, the Supreme Court and the Circuit Courts have limited application of Brady to those guilty plea cases in which the judicial decision establishing the new procedural right would not have prevented the Government from prosecuting the defendant for the crime to which he had pleaded guilty. It was thus found to be of critical importance that, in all of the Brady trilogy cases, the

---

[14]These new procedural rights included the right to challenge the admissibility of a confession out of the hearing of the jury (McMann v. Richardson, supra), and the right to a trial "free from impermissible burdens." (Brady and Parker).

defendants had admitted all of the elements of the crimes to which they had pleaded guilty. United States v. Liguori, 430 F.2d 842, 848-849, 851-852 (2d Cir. 1970); The Aftermath of the Brady Trilogy, 74 Col. L. Rev. 1435, 1477; See also Blackledge v. Perry, 417 U.S. 21 (1974); Robinson v. Neil, 409 U.S. 505 (1973).

The district court's erroneous conclusion that this case was controlled by the Brady exception, rather than the general presumption of retroactivity, stems from its overly broad interpretation of Brady and its overly narrow interpretation of cases such as Liguori. The district court did correctly identify the distinction between the Brady cases and the Ligouri-type decisions. Thus, as to the former, the district court noted that they all involved changes in procedural law:

> The Brady cases involved the invalidation of pretrial and sentencing procedures after the petitioners had entered guilty pleas.
>
> (Memorandum decision at 10).

The district court acknowledged that such cases are distinguished from cases such as Liguori (and, appellant submits, this case)

> [w]here the post-conviction changes in the law had substantive impact, altering the nature of the crime to which guilty pleas had been entered or requiring the Government to establish additional elements of the crime...
>
> (Memorandum decision at 10).

The district court's fatal error, however, lay in its perception of the Brady theory of non-retroactivity as the general rule, rather than what it actually is -- a narrow exception to the general presumption of retroactivity. Thus, the district court held that Brady was controlling, unless the case was shown to fall within Liguori. This misinterpretation was then compounded by the district court's determination that the retroactivity applied in Liguori was required only in those cases where "the Government was entirely barred from prosecuting the defendant as a result of the new case law." (Memorandum decision at 11)(emphasis added). That interpretation of Liguori simply is not correct. Indeed, both the majority and concurring opinions in Liguori acknowledged that, although Liguori could not be prosecuted for the crime to which he had pleaded guilty, he could still probably be prosecuted for related crimes. Id., 430 F.2d at 847, N.4 and 851-852. In fact, the concurring opinion urged the Government to promptly institute such prosecution. Id. at 851-852. Thus, the district court's conclusion in this case that the disposition reached in Liguori was limited to cases in which the Government would be "entirely" barred from subsequently prosecuting the defendant is far too narrow of an interpretation of that case.

In the present proceeding, as in Liguori, the Government will indeed be barred from prosecuting appellant Smith for the crime to which he pleaded guilty, violation of §2114, since, as every-

one agrees, he is not guilty of that crime. The fact that appellant Smith may still be prosecuted for other crimes, such as 18 U.S.C. §641, does not, as the district court concluded, constitute grounds for denying him the relief afforded Liguori, any more than the fact that Liguori could be prosecuted for other crimes prevented the court from granting him that relief.

CONCLUSION

For the above-stated reasons, appellant's application pursuant to 18 U.S.C. §2255 should be granted, his guilty plea, judgment of conviction and sentence should be set aside, and the counts of the indictment charging violations of 18 U.S.C.§2114 should be dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY,
Attorney for Appellant
CHARLES SMITH
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York, 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel.

CERTIFICATE OF SERVICE

11/24, 19

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Michael A. [illegible]